STATE OF MICHIGAN

COURT OF APPEALS

LINA AWADA,

Plaintiff-Appellee,

v

JAMAL JOHN HAMOOD,

Defendant/Cross-Defendant-Appellant,

and

JOE BEYDOUN,

Defendant/Cross-Plaintiff,

and

STONE BIBER & O'TOOLE, P.C.,[1]

Defendant/Cross-Defendant

UNPUBLISHED
June 24, 2003

No. 233707
Wayne Circuit Court
LC No. 98-827594-CZ

Before: Jansen, P.J. and Kelly and Fort Hood, JJ.

PER CURIAM.

In this breach of contract, fraud/misrepresentation, and breach of fiduciary duty case, defendant Jamal John Hamood (Hamood) appeals as of right the trial court's amended final judgment awarding plaintiff $408,061.94. We affirm.

I. JNOV/New Trial/Remittitur

Hamood first argues that the trial court erred in denying his motion for judgment notwithstanding the verdict (JNOV), new trial, or remittitur. We disagree.

This Court reviews de novo the trial court's decisions on a motion for JNOV. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). We review the

[1] Defendants Joe Beydoun and Stone, Biber and O'Toole, P.C. are not parties to this appeal.

evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted. *Orzel v Scott Drug Co,* 449 Mich 550, 557-558; 537 NW2d 208 (1995). A ruling on a motion for remittitur or new trial premised on a claim that the damage award was excessive is reviewed for an abuse of discretion. *Palenkas v Beaumont Hosp,* 432 Mich 527, 531; 443 NW2d 354 (1989). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Bean v Directions Unlimited, Inc,* 462 Mich 24, 34-35; 609 NW2d 567 (2000). This Court may overturn a jury verdict only when it is manifestly against the clear weight of the evidence. The jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 194; 600 NW2d 129 (1999).

A. Exemplary Damages

Hamood correctly argues that exemplary damages are generally not permissible in contract claims. *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401, 415; 295 NW2d 50 (1980); *Farm Credit Services v Weldon,* 232 Mich App 662, 679; 591 NW2d 438 (1998). However, the issue in this case is not whether plaintiff may recover damages for emotional injury based on her contract claim. The true issue is whether plaintiff properly pleaded claims of fraud/misrepresentation and breach of fiduciary duty that were independent of the breach of contract claim. We find that she did.

In *Tempo, Inc v Rapid Electric Co,* 132 Mich App 93; 347 NW2d 728 (1984), this Court ruled that the alleged fraud was not independent of the alleged breach of contract because the fraudulent representation was "an essential ingredient of [the] breach of contract claim, and not independent thereof." *Id.* at 107. Here, the misrepresentation claimed by plaintiff was not an essential ingredient her breach of contract claim. Hamood breached the contract when he refused to pay plaintiff pursuant to the contract terms. This is not related directly to the misrepresentations that Hamood allegedly made to convince plaintiff to sign the promissory note. Similarly, Hamood's failure to pay on the contract was not directly related to the alleged breach of fiduciary duty, i.e., failure to recommend and allow plaintiff to seek outside counsel, failure to properly inform her of social security laws, failure to obtain her consent to settle her insurance claim, and failure to properly explain the investment and provide information in a language she could understand. Therefore, plaintiff properly pleaded claims of fraud/misrepresentation and breach of fiduciary that were independent of the breach of contract claim.[2]

[2] Hamood also argues that when a party is "fraudulently induced" to enter a contract, the remedy is that the contract is voidable or the aggrieved party may sue for breach of contract. Actionable fraud must be predicated on a statement relating to a past or existing fact. *Samuel D. Begola Services, Inc v Wild Brothers,* 210 Mich App 636, 639; 534 NW2d 217 (1995). Fraud in the inducement, intrinsic fraud, occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. *Id.* Here, plaintiff's allegations do not amount to claims of intrinsic fraud because they are predicated on statements relating to existing facts (existing social security laws, the nature of the investment, and Hamood's intentions) rather than future conduct.

We also disagree with Hamood's contention that plaintiff failed to prove exemplary damages. As this Court has held:

> Exemplary (formerly punitive) damages are compensation for injury to feelings**.** They are awardable where the defendant commits a voluntary act which inspires feelings of humiliation, outrage, and indignity. The conduct must be malicious or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights. The purpose of exemplary damages is not to punish the defendant, but to render the plaintiff whole. [*Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 341; 425 NW2d 791 (1988) (citations omitted).]

Here, the evidence was sufficient to show that the act was malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's rights. Hamood abused the attorney client relationship and misrepresented facts for his personal gain. Thus, in addition to sustaining compensatory damages, plaintiff also is deemed to have experienced feelings of humiliation, outrage and indignity if Hamood's actions inspired such feelings. Additionally, plaintiff testified specifically that Hamood knew that the money was to provide security for plaintiff's children. Therefore, there was specific and definite evidence of emotional distress on plaintiff's part. *Wiskotni v Michigan Nat'l Bank-West,* 716 F2d 378, 389 (CA 6, 1983).

B. Fraud/Misrepresentation

Hamood also argues that plaintiff failed to prove the elements of fraud/misrepresentation.

Plaintiff's claim of fraud/misrepresentation consists of three parts:

> 1. Defendants misrepresented that plaintiff could not receive the settlement money because she was receiving social security benefits.
>
> 2. Defendants misrepresented that the loan to Sparky's was safe.
>
> 3. Defendants misrepresented that plaintiff's money was being loaned to Sparky's when Hamood used the money "to purchase capital for himself."

To show fraud or misrepresentation, plaintiffs must prove: (1) defendant made a material misrepresentation; (2) it was false; (3) when he made it, defendant knew that it was false or made recklessly without knowledge of its truth or falsity; (4) defendant made it with the intent that plaintiff would act upon it; (5) plaintiffs acted in reliance upon it; and (6) plaintiffs suffered damage. *Arim v General Motors Corp,* 206 Mich App 178, 195; 520 NW2d 695 (1994).

Plaintiff presented evidence that Hamood misrepresented that plaintiff's money was being loaned to Sparky's when Hamood intended to and did use the money "to purchase capital for himself." At trial, defendant Beydoun testified that Hamood used plaintiff's money for his own purposes. Sparky's financial statement does not show a loan from plaintiff. Although Hamood filed an affidavit denying that he used plaintiff's loan as his "capital contribution," Hamood did not produce the corporate books at trial. A party's failure to produce relevant evidence under his control where there is no reasonable excuse for that failure permits an inference that the evidence would have been adverse. *Lagalo v Allied Corp (On Remand),* 233

Mich App 514, 520-521; 592 NW2d 786 (1999). Viewing the evidence and all legitimate inferences in the light most favorable to plaintiff, we find that plaintiff established her fraud/misrepresentation claim as a matter of law and that there is competent evidence to support the verdict.

C. Breach of Fiduciary Duty

Hamood also argues that plaintiff failed to prove her claim of breach of fiduciary duty.

Hamood argues that plaintiff's breach of fiduciary duty claim fails for the same reason the fraud/misrepresentation claims fails because it was based on the same alleged facts. We disagree for the reasons discussed above. Additionally, although parts of this claim are based on false statements regarding social security benefits and the nature of the investment, other portions of the claim stand independent of this falsity. Hamood breached his duties to plaintiff by not providing the proper information about Sparky's or his own financial status, not translating the paperwork to Arabic so plaintiff could understand, and failing to provide plaintiff an opportunity to seek other counsel with respect to the loan. Plaintiff also testified that Hamood did not obtain her consent before settling the case with Metropolitan. Although Hamood testified, on the contrary, that he apprised plaintiff of his progress on her case, assessing witness credibility is the prerogative of the jury. *Kelly v Builders Square, Inc*, 465 Mich 29, 40; 632 NW2d 912 (2001). Viewing the evidence and all legitimate inferences in the light most favorable to plaintiff, we find that plaintiff established her breach of fiduciary duty claim as a matter of law and that there is competent evidence to support the verdict.

Therefore, we conclude that the trial court did not err in denying Hamood's motion for JNOV, new trial, or remittitur.

II. Attorney Fees

Next, Hamood argues that the trial court erred in determining that plaintiff was entitled to attorney fees. We disagree. We review a trial court's decision to award attorney fees for an abuse of discretion. *Schoenesee v Bennett*, 228 Mich App 305, 314; 577 NW2d 915 (1998).

In this case, the promissory note provided:

> If default be made in the payment of said principal, Holder may, at its option and without further notice, demand and declare the principal sum above-mentioned, or any balance thereof that may be unpaid and any advances made by any Holder hereof together with interest at the rate of eleven percent (11%), beginning on the date of said declaration, immediately due and payable, *together with any reasonable attorneys' fees incurred by the Holder in collecting or enforcing payment hereof*, whether or not suit is filed, notwithstanding anything herein to the contrary, all without any relief whatever from any valuation or appraisement laws, and payment thereof may be enforced and recovery of the whole or part at any time by one or more of the remedies provided to Holder in this Note or under law. [Emphasis added.]

Hamood argues that attorney fees were not proper pursuant to this agreement because he never refused to pay plaintiff pursuant to the note. This was a common theme raised by Hamood

throughout trial. Defense counsel repeatedly stated that he admitted liability. However, Hamood's answer to plaintiff's second amended complaint did not admit liability at all. In his answer to plaintiff's second amended complaint, Hamood again admitted (1) that he signed the promissory note as president of Sparky's, (2) that defendants Hamood and Beydoun signed the promissory note as personal guarantors to plaintiff, (3) that the promissory note provided "Payee may demand payment in full at any time after two (2) years from the date hereof in which case Maker agrees to pay interest and principle . . . within three (3) months of demand." However, he denied that they breached the promissory note agreement.

At trial, Hamood testified that he offered to pay on the note, but that plaintiff would have to wait until he could come up with the money. Plaintiff also testified that Hamood offered to pay but that she would have to wait for the payment. However, Hamood's statement that he "would pay" when he could did not save him from default on the note. Hamood defaulted on the note because he never paid plaintiff.

Hamood also argues that plaintiff should not receive attorney fees because he filed an offer of judgment which plaintiff rejected. However, MCR 2.405(D) provides:

> If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay the offeree the offeree's actual costs incurred in the prosecution or defense in the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.

This rule does not provide any support for Hamood's argument that plaintiff should not receive attorney fees pursuant to the specific terms of the promissory note simply because he filed an offer of judgment.

Hamood's argument that plaintiff failed to properly allocate the attorney fess is also without merit. The attorney fees were obviously attributable only to the breach of contract claim and the jury was specifically instructed by the trial courts: "Now you are to decide only the reasonable attorney fees sought by plaintiff to enforce the contract."[3]

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[3] Additionally, the jury verdict form only mentioned attorney fees in one place and stated:

PART B

CONTRACT

(continued…)

Hamood also argues that plaintiff failed to prove the reasonableness of the attorney fees requested. Plaintiff's counsel requested $64,000 in attorney fees stating that it was one-third of the amount awarded on the promissory note ($192,000). At trial, plaintiff's counsel asked plaintiff why she contacted his firm. She responded that she needed someone to help her get her money from Hamood. Plaintiff's counsel then presented a contingency fee agreement and asked plaintiff if she signed it. She responded that she did. On cross-examination, defense counsel asked plaintiff whether she thought a one-third fee agreement was reasonable. She said that it was. Additionally, plaintiff presented evidence that she and Hamood had also had a contingency fee agreement when Hamood collected the life insurance proceeds for plaintiff. Therefore, plaintiff presented adequate evidence of the reasonableness of the attorney fees requested. *See Morris v Detroit,* 189 Mich App 271, 279; 472 NW2d 43 (1991), quoting *Crawley v Schick,* 48 Mich App 728, 737; 211 NW2d 217 (1973) (enumerating a nonexhaustive list of factors relevant to reasonable attorney fees including a contingent fee agreement).

III. Jury Instructions

Finally, Hamood submits that the trial court erred when it instructed the jury that it could award exemplary damages for plaintiff's tort claims and consider the reasonableness of plaintiff's attorney fees. We again disagree.

To preserve for review an issue concerning a jury instruction, a party must object on the record before the jury retires to deliberate. MCR 2.516(C); *Phinney v Perlmutter,* 222 Mich App 513, 556; 564 NW2d 532 (1997). Hamood did not object to the instruction on exemplary damages. In regard to the instruction on attorney fees, Hamood not only did not object, but actually proposed the jury instruction that the trial court gave. Therefore, these issues are not properly preserved for this Court's review. Even they had been properly preserved, we find the instructions were proper because they fairly and adequately presented the theories and applicable law to the jury. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

(…continued)

PROMISSORY NOTE

1. What is the total amount of reasonable attorney fees awarded to Lina Awada?